

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:

J H COLLECTIBLES INC.

Debtor.

96-28214-MDM

Chapter 11

MEMORANDUM DECISION ON ATTORNEYS' FEES FOR
OFFICIAL COMMITTEE OF UNSECURED CREDITORS

Lead counsel for the Official Committee of Unsecured Creditors, Otterbourg, Steindler, Houston & Rosen, P.C. (OSHR), filed its final fee application for services rendered to the committee during the pendency of the above case. The application requested professional fees of \$749,687.50, plus expenses of \$90,431.74, for a total of \$840,119.24. A portion of the amount requested had been approved on an interim basis and paid, with all parties and the court reserving the right to contest the final amount at the conclusion of the case. All other professionals in the case have had final approval of their fees without objection.

Detailed objections to final approval of OSHR's fees for representing the committee were filed by the major secured creditors, M & I Marshall & Ilsley Bank and American National Bank, who also have substantial unsecured claims, as well as the United States Trustee. A trial was held on those objections, with testimony by the OSHR attorney responsible for directing representation of the committee, an attorney serving as local counsel for the committee, a member of the committee, and the consultant who had been managing the debtor. A number of affidavits of committee members and agreed testimony of OSHR attorneys were admitted by

stipulation. For the reasons stated in this decision, Otterbourg, Steindler, Houston & Rosen, P.C., is awarded professional fees of \$557,832.12, plus expenses of \$84,000.10, for a total of \$641,832.22.

This court has jurisdiction pursuant to 28 U.S.C. § 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(B). This decision represents the court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 9014, incorporating Rule 7052.

BACKGROUND

JH Collectibles, Inc. ("JHC"), a manufacturer of women's classic professional and leisure attire, was founded in 1944. For about the last twenty years, it was owned and run by the Ross family, the driving force being Kenneth Ross, who died in 1994. At the time its financial difficulties came to a head in late 1996, it had two manufacturing plants, one in Milwaukee, Wisconsin, and the other in Nevada, Missouri, and about forty outlet stores that it leased in shopping centers around the country. In addition to manufacturing garments marketed under the JH Collectibles label, it contracted for finished goods both domestically and in foreign countries, particularly in Asia. Although JHC employed union workers in the United States, its contract with its major union, UNITE, provided for penalties for purchase of nonunion goods, which the company had regularly paid as a cost of doing business.

Changes in the market for professional women's clothing and the pressure of cheaper foreign goods put the company in a cash poor position by mid-1996. In September, the Board hired a turnaround consultant firm, The Dratt-Campbell Company, primarily in the person of Arnold H. Dratt. JHC had exhausted its lines of credit, and it was unable to launch manufacture

of its spring line without additional financing. Fall and holiday goods it had ordered from outside suppliers had customers waiting, but JHC had no way to pay to bring these goods into inventory. As a last straw, the banks swept the accounts of about \$12,000,000 and dishonored checks, thus precipitating the filing of the voluntary petition in chapter 11 on October 4, 1996.

The M & I Marshall & Ilsley Bank ("M&I") and American National Bank ("ANB") shared equally a claim of about \$43,000,000, secured by most of the debtor's assets, but not inventory. Other secured creditors held interests in particular assets. At the time of filing, the banks had agreed to a post-petition facility that would eventually total about \$10,000,000, secured by inventory. This arrangement was approved by the court on an interim basis before the committee or its counsel were appointed, and each order authorizing the continuation of post-petition financing was of only two weeks duration, necessitating constant negotiations, reporting, pleadings and orders. This post-petition facility contained a waiver by the debtor of any claim against the banks, such as a preference claim for improvement in position. It did not contain a waiver on behalf of the creditors' committee or a trustee, thus leaving the door open for these entities to make a claim against the banks. Through liquidation of the inventory, the post-petition financing was paid off in January of 1997.

Also before the committee was appointed, the payment of prepetition wages and other payments necessary to recover goods in transit were approved. Shortly thereafter, numerous professionals were appointed, including Mr. Dratt's company as a business consultant to run the company, miscellaneous assets were sold, and a number of unproductive outlet stores were closed. In due course, the committee was appointed and hired counsel on October 15, 1996. The committee selected Otterburg, Steindler, Houston & Rosen, P.C., of New York City as lead

counsel and Howard, Solochek & Weber, S.C., of Milwaukee as local counsel. The application for employment estimated the expected fees for representing the creditors' committee at around \$385,000.

On October 28, 1996, the committee, banks, debtor and their various counsel met to acquaint the committee with how the debtor expected the case to proceed. At that time, the committee was informed that creditors could expect a 7-17% dividend on unsecured debt, figuring claims of up to \$25,000,000 and assets of about \$12,650,000. The debtor's estimate of asset values included only about \$2,000,000 for the trademarks and virtually nothing for inventory located in the United Kingdom.

Shortly following the filing, the company's president, Normand Neal, departed, leaving the management to Mr. Dratt and the chief financial officer, Michael F. Best. At an early hearing, Mr. Best likened their activities to working within a hurricane. They had to assemble fall and holiday goods that had been manufactured elsewhere and to deliver these goods to customers. Not all of the goods JHC had ordered could be sold, and some purchase orders had to be rejected. Because the goods are highly seasonal, these suppliers needed to dispose of their rejected goods immediately so they would lose as little as possible. A number of emergency hearings were necessary to accomplish this on very shortened notice. Prompt action on these rejections also resulted in the waiver by the suppliers of about \$2,500,000 in rejection claims.

Originally, JHC was intended to be sold as a going concern. However, only one such offer was received, and that was too low, so by the end of November 1996, it became clear that an orderly liquidation was the only way to go. With that change of plans, not only did the fall and holiday inventory have to be disposed of quickly, the company had to close the Missouri and

Wisconsin factories, sell the furniture, fixtures and equipment, collect receivables, close the outlet stores and dispose of that inventory, sell or terminate the shopping center leases, sell the trademarks, repatriate the United Kingdom assets, and resolve union contract claims. The committee received several extensions of a deadline to object to the post-petition financing order, thus keeping alive possible claims against the banks. Analysis of claims by and against insiders was also necessary, as was a preference analysis as to all creditors. To say the least, everyone involved with the case was operating at full speed and trying to do a dozen things at once.

On December 20, 1996, the debtor filed a plan and disclosure statement without the input of the creditors' committee. It also filed a motion to set procedures for confirmation of the plan, and a motion to set auction procedures to sell the outlet store inventory, shopping center leases, trademarks and other less valuable assets. The plan included a release of all claims against the banks and former insiders of the debtor, which included a board member related by marriage to the Ross family who owned an apparel business that had had substantial business dealings with JHC. The estimated return to unsecured creditors under the proposed plan was about 18-20% of their claims. Objections by the committee to all of these procedural motions followed, and the court resolved the means by which assets would be sold pursuant to 11 U.S.C. § 363. The disclosure statement and plan were moved to the back burner so all parties could concentrate on the sales, and in February, the debtor conducted successful auctions of its major assets.

A consensual plan was confirmed on May 12, 1997, and the confirmation order became final on May 23, 1997. The confirmed plan provides for a dividend to unsecured creditors slightly in excess of 42% of their claims. A post-confirmation committee and disbursing agent

were authorized by the plan to liquidate a few remaining assets, to object to claims and to prosecute claims that the debtor might have against preference recipients and others.

If any word could be said to characterize this chapter 11 case, it would be “fast,” although it was definitely not a prepack. From filing on October 4, 1996, to confirmation, which was final on May 23, 1997, the case was pending for 229 days. The court held 34 hearings through the May 12, 1997, confirmation hearing. Post-confirmation matters continue, but these need not be addressed here. Two hundred twenty days elapsed between the appointment of OSHR as attorneys for the creditors’ committee and the date the plan became final. It is these 220 days that is the subject of their fee application.

For the period of the chapter 11 case, up to the date confirmation of the plan was final, the court approved the following professional fees:

- Katten Muchin & Zavis (Debtor’s lead counsel): \$527,006.50 fees, \$63,403.16 expenses, totaling \$590,409.66.
- Whyte Hirschboek Dudek, S.C. (Debtor’s local counsel): \$332,134 fees, \$58,176.52 expenses, totaling \$390,310.52.
- Clifford Chance (Debtor’s U.K. counsel): \$84,197.70 fees, \$649.13 expenses, totaling \$84,846.83.
- Michael, Best & Friedrich (Debtor’s special counsel): \$3,301.50 fees, \$251.82 expenses, totaling \$3,553.32.
- Deloitte & Touche LLP (Debtor’s special accountants): \$96,384 fees, \$1,024.14 expenses, totaling \$97,408.14.
- The Dratt-Campbell Company (Debtor’s business consultant): \$120,912.75 fees, \$8,445.15 expenses, totaling \$129,357.90.
- Coopers & Lybrand L.L.P. (Debtor’s financial advisor): \$32,905.50 fees, \$537.39 expenses, totaling \$33,442.89.
- Keen Realty Consultants Inc. (Debtor’s real estate consultant): \$70,620 fees, \$4,149.52 expenses, totaling \$74,769.52.
- Howard Solochek & Weber (Creditors’ Committee’s local counsel): \$123,865.50 fees, \$5,744.55 expenses, totaling \$129,610.05.
- Alco Capital Group, Inc. (Creditors’ Committee’s business consultant): \$43,750 fees, \$15,361.56 expenses, totaling \$59,111.56.

•BDO Seidman, LLP (Creditors' Committee's accountants): \$107,500 fees, \$3,784.24 expenses, totaling \$111,284.24.

FEE STANDARDS

Section 330(a) of the Bankruptcy Code provides that a court may award "reasonable compensation for actual, necessary services rendered" by the attorney, as well as "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). The court may award compensation that is less than the amount of compensation requested. 11 U.S.C. § 330(a)(2). The claimant bears the burden of proving the fees sought are reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941 (1983). As this is a priority claim, it is subject to strict scrutiny by the court. *Matter of Jack Winter Apparel, Inc.*, 119 B.R. 629, 632 (E.D. Wis. 1990).

The various means by which courts have determined appropriate fees for attorneys' services in a chapter 11 case is helpfully and succinctly summarized in *Matter of Hutter Construction Co.*, 126 B.R. 1005 (Bankr. E.D. Wis. 1991). Here we have objections to OSHR's fees, but the court also has an independent duty to scrutinize fees that are being paid from the estate.

We begin with the "lodestar" method, which is arrived at by determining the reasonable number of hours in which the professional was engaged in work for the committee, and multiplying that by a reasonable hourly rate. *City of Burlington v. Dague*, 505 U.S. 557, 559-60, 112 S.Ct. 2638, 2640 (1992); *Blum v. Stenson*, 465 U.S. 886, 898-900, 104 S.Ct. 1541, 1548-50 (1984). The court should exclude from the initial fee calculation hours that were not reasonably expended or inadequately documented. *Hensley*, 461 U.S. at 433-34, 103 S.Ct. at 1939-40. The

reasonable rate is presumed to be that which the firm charges other clients on the open market, including nonbankruptcy clients. *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993).

The documentation accompanying this fee request is extensive. The application is five inches high; we measured. Some of the entries are cryptic, but generally adequate. The narrative description of work performed went on for 38 pages in the final fee application. Thus, failure to record work performed is not the source of the banks' and United States Trustee's objections.

Once the reasonable number of hours and the reasonable hourly rate have been established and the resulting lodestar figure calculated, there is a "strong presumption" that the lodestar represents the "reasonable fee." *Dague*, 505 U.S. at 562, 112 S.Ct. at 2641. The lodestar can then be adjusted upwards or downwards to reach a final fee award after consideration of even more factors. *Hensley*, 461 U.S. at 434, 103 S.Ct. at 1940. A party wishing to dispute the lodestar carries the burden of presenting evidence challenging the accuracy or reasonableness of any item in the application. *Blum*, 465 U.S. at 892 n.5, 104 S.Ct. at 1545 n. 5.

Many courts have applied the standards set forth in *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), to determine what constitutes reasonable compensation. The *Johnson* factors include (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and

length of the professional relationship with the client; and (12) awards in similar cases. *Id.* Several of these factors are already taken into account with the initial lodestar calculation, so only those which have not already formed the basis of the lodestar shall be considered in adjustments to that amount. *Hensley*, 461 U.S. at 434 n.9, 103 S.Ct. at 1940 n.9.

In this case, the opponents to the fee application have not disputed the customary hourly rates charged by the individual attorneys at OSHR, which are typical for New York counsel doing this type of work. Nevertheless, the court must make an independent evaluation of the hourly rate charged. In determining the appropriate hourly rate, the court can consider not only how tasks were assigned within the firm, but whether counsel from outside the district should have been employed when nonlocal counsel's rates are higher than local counsel. If local counsel would have been appropriate, local rates may apply. *See In re Cambern*, 134 B.R. 565 (Bankr. E.D. Tex. 1991); *In re Waldoff's, Inc.*, 132 B.R. 329 (Bankr. S.D. Miss. 1991) (both holding that only local rates should be awarded because cases had only local significance). Here, the creditors' committee chose lead New York counsel along with local counsel, and the debtor chose lead Chicago counsel along with local counsel. Mr. Dratt, the debtor's management consultant, is also from Chicago. The majority of the other professionals were located in Milwaukee. Generally, it is good policy to allow parties to a bankruptcy to choose attorneys whom they feel can best represent their interests, even if those attorneys charge more than attorneys headquartered in the district, especially when the bankruptcy case is national in scope, as this one is. *See In re Farley, Inc.*, 156 B.R. 203, 213 (Bankr. N.D. Ill. 1993) (noting that in "national" cases, courts have generally held that attorneys may charge the rates prevailing where their offices are located). Indeed, much of the debtor's business had been overseas, and

substantial assets were in Europe. OSHR has valuable experience in several recent bankruptcies in the clothing and textile industry, and members of the creditors' committee would understandably search out such a firm to represent them. Therefore, a court expects and is not shocked by rates that exceed the local norm.

On the other hand, expensive counsel is expected to render services commensurate with the rates charged. As one court put it, "attorneys who bill at higher rates do so because they work smarter, better, and faster." *In re Rocky Mountain Helicopters, Inc.*, 186 B.R. 270, 273 (Bankr. D. Utah 1995). Thus, in calculating the appropriate hourly rate to be multiplied by the appropriate amount of hours expended, the court must take the quality of the services rendered into consideration. How tasks are assigned by the attorney in charge to others active in the case may also have substantial impact on the overall hourly charge. *See In re Narragansett Clothing Co.*, 210 B.R. 493, 499 (B.A.P. 1st Cir. 1997) (holding that bankruptcy court properly reduced a chapter 11 trustee' compensation from \$200 per hour to \$160 per hour because the trustee failed to delegate certain tasks to paralegals, assistants, clerks and messengers). Lead attorneys are expected to assign tasks to attorneys within the firm, or to local counsel, whose rates and skills are appropriate for the particular task; that is, an expensive partner should not be doing what a less expensive associate is quite capable of doing. Dividing the total number of hours devoted to the case by all attorneys into the total fees requested results in a "blended rate," which gives a good indication of how assignments were made. *Farley*, 156 B.R. at 206. More hours assigned to less costly associates, or to less costly local counsel, result in a lower blended rate, but whether this is appropriate depends on what is going on in the case.

The court must also consider whether the number of hours devoted to the case, or to particular tasks within the case, was reasonable under the circumstances. This involves common sense and hindsight, the latter of which was not available to the attorneys when the work was performed, but the former is expected at all times. The concept is necessarily flexible and fact specific. No one expects attorneys to be paid based solely, or even primarily, on the results obtained; otherwise, who would we get to clean up the messes some people bring to bankruptcy court? A certain amount of experimentation must be tolerated and compensated, because without creative solutions (some of which do not work), failure would be even more frequent than it is. Occasionally, the principle sought to be vindicated during the course of the case is more important than the result obtained, and the system asks that attorneys bring these issues to the court's attention without reference to whether there is enough money to pay for such service and with the understanding that creditors will receive less. For example, the cost of an objection to an individual's discharge by a trustee to preserve the integrity of the system might be a legitimate cost to the estate, the importance of which outweighs the importance of increasing the dividend to creditors, even if the trustee loses. This is qualitatively different from a situation where the attorneys expend \$80,000 worth of time to recover a \$33,000 preference. *See Matter of Taxman Clothing Co.*, 49 F.3d 310, 316 (7th Cir. 1995). Most of this decision focuses on this consideration.

As was detailed in *Hutter Construction Co.*, 126 B.R. at 1010, courts have attempted to quantify how fee determinations are made by articulating "tests," such as the *Johnson* tests, in an effort to avoid arbitrariness and to promote predictability in finding the appropriate hourly rate and number of hours that should have been spent on the case. Once this lodestar determination

has been made, other tests look at the overall cost and results of the representation, applying a “macroanalysis” or “cost/benefit” approach. All of the approaches focus on the quality of work done and benefit to the estate, but none provides mathematical certainty that can be transferred from case to case. In essence, they all boil down to a subjective judgment when the court looks at the work done, results obtained, time spent, and the hourly fee charged and asks, “Was it worth it?”

ANALYSIS

1. Statistics

A few statistics might put OSHR’s fee application into perspective with respect to this case and to the other professionals involved. As was noted earlier, the period of this application is from October 15, 1996, to May 23, 1997, a period of 220 days. During this period, OSHR attorneys spent 2,616.3 hours on the case, or 11.89 hours per day, including Sundays and holidays. Fees requested, totalling \$749,687.50, are an average of \$3,406.76 per day. Fees and expenses would be \$3,818.72 per day. If all of the fees and expenses for professionals, both approved and requested, are added together and averaged, the Official Committee of Unsecured Creditors was serviced in this case to the tune of \$5,182.38 for each and every day it was pending (\$1,024,803 fees, \$115,322.09 expenses, \$1,140,125.09 total).

Most of the work done by OSHR was assigned to three attorneys: William M. Silverman, Jenette A. Barrow, and Lorenzo Marinuzzi. Mr. Silverman is a member of the firm and was responsible for assigning tasks within the firm. Mr. Silverman charges \$425 per hour; Ms. Barrow, a senior associate, charges \$305 per hour; and Mr. Marinuzzi, a junior associate, charges

\$140 per hour. During the pendency of the case, Mr. Marinuzzi was a member of the New Jersey bar but had not been admitted in New York. The blended rate for the fee request is \$286.55 per hour. Mr. Silverman billed almost \$290,000, or about 22 hours per week.

Local counsel for the committee is Howard, Solochek & Weber. Most of the work was done by Attorney Albert Solochek at \$170 per hour, so the firm's blended rate was \$167.82. Approved fees and expenses for local counsel were \$123,865.50, plus expenses of \$5,744.55. The committee was also advised by its accountants, BDO Seidman, L.L.P., who received \$107,500, plus expenses of \$3,784.24. The committee's business consultant was Alco Capital Group, Inc., who were awarded fees of \$43,750, plus expenses of \$15,361.56.

In contrast,¹ the debtor's lead counsel, Katten Muchin & Zavis ("KMZ") of Chicago, was awarded \$527,006.50 in fees, plus expenses of \$63,403.16, for a total of \$590,409.66. KMZ devoted a total of 3,028.10 hours to the case, for a blended rate of \$174.04 per hour. Debtor's local counsel, Whyte Hirschboeck Dudek S.C. logged 1,817.10 hours and was awarded fees of \$332,134, plus expenses of \$58,176.52. Its blended rate was \$182.78.

The breakdown of the fee request as it applies to some of the various tasks undertaken by OSHR will be addressed in subsequent sections of this decision. Every task performed during the case does not call for separate discussion, but these, too, are considered in the overall fee determination.

¹Debtor's lead and local counsel began incurring fees and expenses from the date the petition was filed, *October 4, 1996*.

2. Post-petition Financing; Cash Collateral

The post-petition financing agreement between the banks and the debtor, negotiated before filing, waived any claim the debtor might have against the banks, such as a preference. Since the creditors' committee and any trustee might assert such a claim, it fell to the committee to negotiate renewals of the post-petition financing as the only party with any clout against the banks. This was done at the debtor's request. The banks only extended the financing for two weeks at a time, a posture that drew pointed criticism from various factions, so the committee's counsel had to devote considerable time to this task. It also prepared a motion for use of cash collateral, to be used in case there came a time when there was no agreement. This motion was not needed.

Over the two months the use of cash collateral was an issue, OSHR devoted 286.8 hours to debtor-in-possession financing, and is requesting fees of \$91,697.50. A total of four amended post-petition financing agreements were negotiated and approved, and the post-petition financing liability to the banks was paid on January 15, 1997. (Pp. 15-16 of Disclosure Statement, dated April 7, 1997). The orders approving the agreements included extensions of the deadline for the committee to object to the original order for post-petition financing. Subsequent extensions were basically repetitions of the first extension, and all documents and orders were drafted by the banks' counsel, not committee counsel. The first interim fee request, which co-incidentally goes through January 15, 1997, was over \$88,000. This is a lot of money for four orders, none of which were litigated. Granted, the banks' claims had to be investigated in connection with this matter and with the analysis of the plan, and Mr. Silverman testified that they did so in detail. Counsel's time constraints, one of the *Johnson* factors, were considerable. So was the amount at

stake, another *Johnson* factor, and the consequence of failure to keep the debtor functioning to complete the liquidation would have been grave. However, two document boxes held the banks' records, and no depositions were ever taken. Thirty pages of small computer print comprise the attorneys' time records (described to a considerable extent as "examine documents"), and the court has no reason to doubt the time was expended as described. This court is nevertheless left with the definite and firm conviction that far too much time was devoted to these orders, and even mortal attorneys should have been able to accomplish the same tasks in fewer hours.

3. Plans and Disclosure Statements; Confirmation Procedures

The conduct of the committee's counsel with respect to plans and disclosure statements filed by the debtor was particularly interesting. On December 20, 1996, the debtor filed a plan, disclosure statement, motion to set procedure for confirmation, and sale procedure motions. There was an unrelated hearing that day, and Mr. Silverman was present, but no one handed him copies of these documents. They were sent by Federal Express and arrived at Mr. Silverman's New York office the following Monday, December 23. A hearing on shortened notice for sale and confirmation procedures was set for December 30. These documents largely disposed of all assets of the debtor, waived substantial potential claims against the banks and insiders, and set the legal rights of all parties in the distributions, but they had been formulated by the debtor (and presumably the banks, who got their releases) without any input from the creditors' committee. Given the speed with which this case was moving and the usual role of counsel for the unsecured creditors' committee, this was an extraordinary act by debtor's counsel.

The case had been running at full tilt for a little over two months. There were millions of dollars at stake. Some attorneys in Mr. Silverman's position might have reacted as follows:

Uh, oh. The people who control the assets have cut us off. They propose selling things in ways that won't bring the most money. They are releasing entities we could get money from. We have the most to lose. We have contacts within the industry that might buy these assets. We could help. They know that, but they aren't talking to us. I don't know why.² I'd better send out an olive branch so I can salvage this thing.

But there was no olive branch in Mr. Silverman's arsenal. OSHR's time records show not a single call to debtor's counsel or to the bank's counsel during that week after the plan, disclosure statement and various motions were received and the next hearing was held in Milwaukee. Instead, he went to war. He met with his committee and informed them of the debtor's treachery. They urged him to pull out all the stops to protect their rights. He filed objections which resulted in modification of the sale and plan confirmation procedure. About 130 hours of attorneys' time was spent that week in this endeavor. Mr. Steven Bolingbroke, a member of the committee testified that the committee was very satisfied with the quick, decisive, and effective action taken by the firm. Affidavits filed by other committee members likewise attest to the satisfaction the committee felt toward its counsel.

Without question, OSHR's reaction to the debtor's filings was excellent legal work. But why did the debtors commit an act of war in the first place? What led experienced debtor's counsel to abandon the concept of a negotiated plan? This is practically unheard of. Given this

²Mr. Dratt testified that he quit talking to Mr. Silverman because "It was Bill's way or the highway." He said his attorneys felt the same way. When the court asked Mr. Silverman why he thought Mr. Dratt might say that, Mr. Silverman did not know. He claimed to have no animosity toward Mr. Dratt and could not understand Mr. Dratt's attitude.

remarkable turn of events, it is not unreasonable for the court reviewing the professionals' fees to ask not only what the applicant did, but why did it have to be done?

Litigation takes place at center stage with the court present, but important things that lead up to it, namely negotiation and discovery, occur out of sight. This is as it should be, but it puts the court at a disadvantage when asked to rule on the reasonableness of fees related to the very matters that must take place out of sight, when the polite, dignified people we see in court might not be behaving in the same manner.

A few clues surfaced at trial that gave a flavor of events that might have caused the debtor to file a plan and disclosure statement without warning. Mr. Dratt testified that Mr. Silverman insisted in having things done only his way and was unwilling to consider alternatives. This was apparently interpreted as a nonnegotiating stance. Mr. Dratt also said he was being constantly bombarded with letters from Mr. Silverman, which he referred to as "nastygrams," that created a voluminous record characterizing events in ways Mr. Dratt did not necessarily agree with but did not have the time or inclination to respond to. He stated that the debtor "could not keep enough paper in the fax machine" to keep up with Mr. Silverman's correspondence. At a personal level, Mr. Dratt found Mr. Silverman "curt and imperious" at their first telephone meeting, and he said that Mr. Silverman continued to treat any suggestions made by the debtor with disdain.

Mr. Dratt was not the only recipient of Mr. Silverman's letter writing campaign. Accompanying a separate response to Mr. Silverman's comments on the sale motions was a joint letter signed by both of the debtor's two primary attorneys at KMZ (Trial Ex. 14). The letter, dated December 24, 1996, in essence, begged for dialogue. Messrs. Heller and Marwill noted,

A telephone call concerning the items set forth in your letter would have been sufficient, and more economic [sic] for the Debtor's estate. We have repeatedly requested that you engage the Debtor and its professionals in a discussion of the Committee's concerns rather than proceeding with a letter writing campaign that escalates administrative expenses and can only serve to create a record you must think will be of utility to you at some point. Letters are fine, indeed welcome, when you need something and think there is a risk it will "fall between the cracks." . . . In our collective years of experience, we have never encountered as senseless and offensive a letter writing campaign as yours. As is your custom, we anticipate you will feel the need to respond to this letter. Our failure to seek the "last word" to your past or anticipated letters is not an admission of the facts or circumstances set forth therein, but rather, a choice to limit unnecessary costs and expenses to the Debtor's estate and to disengage ourselves from a senseless drill. Your calls and constructive suggestions remain welcome.

(Trial Ex. 14).

Whether each and every letter Mr. Silverman sent to the debtor or its counsel which led up to this December 24 letter was unnecessary or offensive is impossible for the court to ascertain, although some that were presented to the court certainly had an unpleasant tone. What is clear, however, is that the way Mr. Silverman was treating the debtor's representatives and its counsel was counterproductive, and the recently filed plan and disclosure statement should have convinced all but the most dense that a change of tactics was in order. The old tactics had resulted in a freeze-out of the committee and a disadvantageous proposal. Nevertheless, in spite of Messrs. Heller and Marwill's suggestion that telephone discussions were the better way to handle negotiations, not one telephone call to debtor's counsel was made that week from OSHR. KMZ had responded in kind to Mr. Silverman's letter regarding the sale motions, and it was up to him to respond to their request for negotiation. Failure to accept this invitation to repair their working relationship would virtually guarantee that the war would continue.

So what was Mr. Silverman's response? He wrote another letter, and a peevish one at that (Trial Ex. 3). After an incongruous "Happy Holidays!" he proceeded to castigate counsel for

their failure to turn over requested documentation fast enough and their failure to provide copies of the plan, disclosure statement and sale motions at the December 20 hearing:

The representatives of the Creditors' Committee have repeatedly tried to work with the representatives of the Debtor and to learn critical facts regarding the Debtor's operations and efforts in the Chapter 11 proceeding. Instead of cooperation in person, over the telephone or in response to our letters, we have been met by a "stone wall". [sic] Much of the information we have repeatedly requested has not been produced.

...

Parenthetically, what appears to have "fallen through the cracks" is any effort at basic civility. . . .

(12/24/96 Silverman Letter, Trial Ex. 3). If this is how Mr. Silverman repairs or establishes a working relationship, he probably puts out fires by pouring gasoline on them.

Mr. Dratt testified that the December 20, 1996, plan and disclosure statement were filed to get the committee to negotiate; he and his counsel felt there was no other way to force some give and take since nothing else had worked. He did not view this plan as the debtor's final proposal, although he signed and caused it to be filed. He even admitted there was a mistake in the plan, and the debtor had not intended to release claims against insiders. Mr. Silverman testified that he viewed this plan as a serious proposal that the debtor wished to force on the creditors. The motion for confirmation procedures also indicated to him that the debtor was moving forward, not submitting the first draft of a plan for consideration. Conditional motions to convert by the banks and the United States Trustee were also pending, which also indicated the debtor was trying to force a resolution of the case. Mr. Silverman had a right to regard the plan in this manner, of course, but open communication would have given him a different picture and generated far less work. With open communication, the plan might not have been filed in the first place.

Eventually, a negotiated plan was filed and confirmed. But OSHR did not take the laboring oar in negotiating the terms. According to Mr. Solocheck, there was a consensus among interested parties that he and Mr. Crocker, on behalf of one of the banks, take primary roles in negotiating the final plan. This shift in responsibility for this most important aspect of the case speaks volumes about OSHR's effectiveness at this point.

The substantive terms of the final plan are substantially different from the original. In the course of negotiations, the banks increased the amount they were "giving up" of their claims in favor of the unsecured creditors from \$550,000 to \$1,000,000. The banks received releases, but insiders did not. Almost \$16,000,000 in insider claims against the debtor were subordinated and transferred to the banks for a nominal amount, thus reducing the banks' shares of distributions to unsecured creditors. This would not have been the final outcome without vigorous committee representation, but as Mr. Solocheck was on the front lines of negotiations, he must receive some of the credit.

OSHR's fee application indicates that they spent 46.7 hours on the disclosure statement and 374.1 hours on the plan of reorganization, for a total request of \$136,444. Mr. Solocheck's firm, who negotiated the final terms of the plan, spent 90.8 hours for fees of \$15,436. Total representation of the committee with respect to the plans and disclosure statements would be \$151,880. None of this involved contested proceedings before the court, nor was any formal discovery ever conducted.

Debtor's lead and local counsel, on the other hand, spent a total of 642.6 hours, at a cost of \$119,285. Therefore, debtor's counsel spent more time but fewer dollars in negotiating and generating these documents than the committee did negotiating, reviewing and objecting to them.

In other words, the cost of the reaction is considerably higher than the action. This is unusual and, in the court's opinion, unjustified.

Mr. Silverman and members of the creditors' committee repeatedly pointed to the 42% dividend, as opposed to the original 7-17% estimate, as proof of OSHR's contribution to this reorganization. Negotiation of the reduction in the banks' share of the claims played a significant role in this change. However, there were other forces at work as well. Mr. Dratt pointed out that the original estimate was based on assets of \$12,650,000, and assets eventually recovered were over \$15,000,000. This obviously increases the distribution to creditors. OSHR attributes the greater recovery to its groundwork with the asset buyers; Mr. Dratt believes a competitive marketplace took over once the bidders were there, and the debtor had been working on the same bidders. Also, claims came in at \$15,000,000, not the \$25,000,000 of the first estimate. This is probably the biggest factor in enhancing the recovery of those who filed, but committee counsel can take no credit for this.³ Concessions by the banks and suppliers, in which committee counsel did play a part, were certainly a factor. To summarize, committee counsel may have increased the creditors' recovery on their claims, but not to the extent they argue.

4. Sale Procedures; Auctions

Along with the plan and disclosure statement, the debtor filed motions for sale procedure on December 20, 1996. The major assets to be sold were the debtor's trademarks, shopping center leases, and the right to conduct the going-out-of-business sales for the outlets. The

³Committee counsel did act to reduce the rejection claims of suppliers, but Mr. Dratt was unsure of whether these claims were in the original estimate.

motions were filed without input from the committee. OSHR has had considerable experience in insolvency proceedings within the fashion industry, and several committee members are also knowledgeable. They know people who might buy these assets; in fact, Mr. Silverman's former partner is counsel for Jones New York, which purchased a block of leases. Mr. Silverman had also previously worked with the principal representative of Liz Claiborne, Inc., who purchased the trademarks. Alco, the committee's business consultant, is a liquidator in this field. Once again, the debtor's representatives believed the committee's professionals were impossible to deal with, and filing sale motions was its way of forcing dialogue.

At the hearing before this court on December 30, 1996, the committee's view prevailed, and the sale procedures were changed substantially from the motion. OSHR argues this was because of its zealous advocacy; the objectors say they would have arrived at something close to the eventual sale procedures if there had been some give and take in the first place.

The eventual sale price of the trademarks was \$3.75 million, which the debtor had earlier estimated at \$2 million. Mr. Silverman feels that his contacts with the buyer and explanations as to how the value of a trademark should be calculated resulted in this increase. Mr. Dratt testified that he and the debtor's officers also had contacts with the same potential buyers of the trademarks and other assets, and he believes the market, i.e., the desirability of the product, is what drove the sale price. We will never know. Nevertheless, Mr. Silverman's contacts within the industry were, no doubt, valuable. OSHR's fee application indicates 226.5 hours spent on Acquisition/Divestiture Work/Asset Disposition for \$77,997, which equals a blended rate of \$344.36 per hour.

OSHR argues it deserves substantial credit for the final outcome of these sales, which drives the 42% recovery for unsecured creditors. The court is persuaded that OSHR's evaluation of its role in the final result, while valuable, is overstated.

5. United Kingdom Assets

When the case was filed, a substantial amount of inventory was stored in warehouses in the United Kingdom. The debtor initially listed this inventory at negligible value because the debtor feared there might be storage claims and other claims by U.K. customers that would wipe out the inventory's value. On January 13, 1997, a London solicitors firm, Clifford Chance, was appointed to represent the debtor in recovering assets in the United Kingdom and in settling various claims. Approximately \$1,500,000 was repatriated for the benefit of the estate and the creditors. Clifford Chance was awarded fees of \$84,197.70 and expenses of \$649.13.

OSHR points to the debtor's original estimate of the value of the U.K. assets and asserts that were it not for OSHR's refusal to accept the debtor's valuation, the \$1,500,000 would have been lost. It is not clear from the fee application how much time was spent on this issue, but Mr. Silverman testified that he frequently reminded those in charge of the debtor about these assets. Even Mr. Solochek described his lead counsel as a "noodge"⁴ on this subject.

Mr. Dratt's testimony regarding the U.K. assets paints a different picture. He testified that he and the debtor's other management fully intended to attempt to liquidate these assets from

⁴This term is sometimes spelled "nudzh" and is probably of Yiddish origin. It can be a noun or a verb, and in this case it means someone who nags or pesters someone to do something. This is contrasted with "nudge," an English word with a similar pronunciation, which means to push gently. There is nothing gentle about a noodge. The court knew exactly what Mr. Solochek meant.

the start, but they estimated value conservatively early in the case. He described Mr. Silverman's constant reminders as a hindrance, not a help. He stated that Mr. Silverman pushed him to liquidate the merchandise from the warehouse, which would have produced far less than Mr. Dratt's method of disposing of the merchandise through stores at full margin. Mr. Dratt simply ignored any of Mr. Silverman's suggestions, as he came to ignore suggestions regarding other issues.

Apparently, the disposition of the U.K. assets was part of the "nastygrams" described by Mr. Dratt. It was part of the December 24, 1996, letter from Mr. Silverman to debtor's counsel berating them for their incivility. It is possible that the reminders served to push the debtor to "do something," but with competent and experienced counsel and management, this court is skeptical that the debtor would have walked away from valuable assets had they not been constantly reminded to take action. Furthermore, Mr. Silverman's suggestions as to how the disposition should be accomplished were not taken, and no one argues that the debtor's method brought anything but excellent results. Since it is human nature to do the opposite of what one is nagged to do, and that is what occurred here, perhaps the nagging was productive. But being annoying as well as wrong does not warrant top fees, even if everything turned out satisfactorily anyway. Finally, the efforts of U.K. counsel in reaching settlements with U.K. claimants must not be overlooked.

6. Committee Relations

Mr. Silverman repeatedly stated that actions taken in this case were done at the request of the committee after he had informed them of developments. Mr. Bolingbroke testified to that

effect, and a number of affidavits of committee members admitted by stipulation also speak highly of OSHR's work. Without question, the committee is pleased with its counsel. After all, unsecured creditors will receive close to 42% of their claims, as opposed to the 7-17% initially estimated. They observed that substantial assets were unexpectedly recovered, a proposed plan favorable to the banks and insiders was scuttled, and the banks in the end gave up a significant portion of their claims, resulting in more for the unsecured creditors. However, even Mr. Silvermen admitted that the committee was receiving its interpretation of why events occurred only from OSHR.

Many clients complain that their attorneys do not give them enough information. That did not happen here. The fee application shows 220.20 hours and \$60,449.50 in billable time devoted to "Committee Meetings." An additional 144.90 hours and \$44,712 in billable time is devoted to "Communications with Creditors' Committee and Creditors." About \$10,000 of these fees are allocated to a \$120 per hour paralegal who set up the conference calls with the committee, and sent out agendas and documents. Ms. Barrow, at \$305 per hour, took minutes at each conference call. The committee's firm was spending an average of 1.7 hours per day, including Sundays and holidays, keeping it posted on what was going on. While the firm's personal attention to its clients is first rate, the court is left with the distinct impression that the firm went overboard in this regard.

7. Reasonableness

As was stated earlier, the hourly rates of OSHR lawyers is reasonable. However, the number of hours spent on this case, and on particular components of the case, was not. Staffing

of the case was highly uneconomical, with far too much being done by attorneys with high hourly rates. A blended rate of over \$100 per hour more than debtor's counsel is clearly overkill, especially when it is debtor's counsel who is drafting most of the documents that are being reviewed by committee counsel. Far too much time was spent on committee meetings and communications, and a \$305 per hour senior associate should not have been recording minutes, even if she was necessary at times to report on particular issues. For the kind of money devoted to these matters, the committee could have been meeting at a resort.

Too many problems dealt with by the committee's counsel during the case were self-inflicted. Attorneys with extensive experience in large cases of a similar nature can rightfully command top dollar, but they need to be able to work "smarter, better, and faster." Part of working smarter in the chapter 11 context is having rudimentary interpersonal skills that enable the attorney to craft a consensus among many opposing, or at least differing, interests. Granted, a consensus is not always possible, even with the most skilled problem solvers, in which case litigation skills are vital to a satisfactory result. Indeed, the threat of being a successful litigator is a highly effective bargaining tool. But alienating opposing parties straight out of the gate is not smart or effective. Demanding your own way in situations that most people perceive as requiring compromise is not a consensus builder. If opposing parties perceive a non-negotiating stance, they are likely to move directly to litigation, and litigation should be a last resort. It is expensive, a characteristic that runs counter to the goal of a bankruptcy liquidation; that is, paying creditors to the greatest extent possible. Litigation drives up fees on all sides, making more work for counsel for all parties who must deal with one party's unacceptable or unreasonable position. No one expects counsel to be charming to be effective, although many of

the best ones are, but a willingness to be flexible and to look for creative solutions, and the ability to adjust to different styles and skills and to see many sides to an issue are qualities that really good attorneys bring to the bankruptcy arena. While OSHR was a vigorous advocate, as a negotiator and consensus builder, it fell short of what one expects from effective committee counsel. This was not a simple case; it moved very fast and took place in a specialized, global industry, but it was a case that was readily resolvable by civilized negotiation, as eventually occurred. Few matters were litigated,⁵ and much of the behind-the-scenes work in this case would have been obviated with cooperation rather than combat.

CONCLUSION

OSHR's first interim fee request included \$22,510.75 for photocopies, which a footnote indicates is \$.35 per page. The number of photocopies is not disclosed, and the amount is not evenly divisible by .35, which leaves us wondering about that partial page. Putting that aside, in this district, \$.25 per page is usually considered adequate, and OSHR produced no evidence as to why it should be more. The second interim and final applications request \$.25 per page, but the first fee request must be adjusted to \$16,079.11 for photocopies. This reduces expenses by \$6,431.64. As OSHR's expenses are reasonable, it is awarded \$84,000.10 as final expenses.

As was stated earlier, cases setting forth factors the court may consider in fee awards do not provide mathematical guidelines that are transferrable from case to case. Therefore, this

⁵The UNITE claim, settlement of which was contested by one of the banks, was argued ably by committee counsel, and they argued successfully for modification of sale procedures. None of the court proceedings in this case, until this fee dispute, required fact finding litigation before the court.

court has chosen to address the separate tasks that represent the most egregious overreaching and to address the balance of the fee request as a whole.

First, the request of over \$100,000 for committee meetings and committee relations enters the realm of the ridiculous. This will be reduced by 50%, resulting in a reduction of \$52,580.75.

Second, the request for work done on the plan and disclosure statement will be reduced by 40%, or \$54,577.60. The amount of time devoted to this task was directly related to the abrasiveness of OSHR's attorneys and their refusal to enter into the give and take process of negotiation. Not only was much of their own work unnecessary and done in response to problems they had generated, they drove up everyone else's fees. In the end, local counsel negotiated the final result.

Third, there must be a reduction of 20%, or \$18,339.50, for work done on cash collateral issues. A substantial responsibility fell on the committee counsel in this regard, but by asking for over \$90,000 when all documents were drafted by the banks and there was no litigation, the court is persuaded that they massaged this task to the hilt.

Fourth, the request for work done on the sale and procedures will be reduced by 20%, or \$15,599.40. Here, the blended rate was \$344.36, which means staffing was skewed too far toward the high cost attorneys. Counsel was successful in modifying procedures, but it would have been much less expensive if someone in the firm had picked up the telephone and said, "Can't we do this differently?" rather than litigating the issue. On the other hand, committee counsel was helpful, although not fully responsible, in encouraging bidders at the auctions. Without their helpful input, the reduction would have been greater.

After subtracting the 1,299.2 hours devoted to the above tasks, 1,317.1 hours remain. OSHR has requested a total of \$411,300 for the 1,299.2 hours that were addressed separately, leaving the remaining 1,317.1 hours allocated to the remaining \$338,387.50 of the fee request. Those remaining hours have a blended rate of \$256.92. As has been stated throughout this decision, committee counsel overworked and overstaffed this case from the beginning. Examples related to the tasks highlighted are indicative of the conduct of the entire case, and a 15% reduction in the balance of the fee request is warranted. This case was negotiated; it was not litigated, and the evidence indicates that in the art of negotiating, committee counsel is not particularly skilled. This makes the blended rate of \$256.92, over \$75 more than debtor's lead and local counsel, still too high. The 15% reduction to a blended rate of about \$218.38 recognizes committee counsel's experience and the good outcome of this case, but it also puts their contribution in perspective with the entire case. The remaining fee request of \$338,387.50 is reduced by \$50,758.13.

Total reductions of \$191,855.38 result in an award of \$557,832.12. OSHR's overall blended rate is \$213.22, significantly more than debtor's counsel, but this court believes it is appropriate under the circumstances.

A separate order will be entered accordingly.

Dated at Milwaukee, Wisconsin, December 18, 1997.

BY THE COURT:

Honorable Margaret Dee McGarity
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:

J H COLLECTIBLES INC.

Debtor.

96-28214-MDM

Chapter 11

ORDER

For the reasons set forth in the court's memorandum opinion entered on this date,
IT IS ORDERED, Otterbourg, Steindler, Houson & Rosen, P.C., is awarded final
compensation of \$557,832.12, and final expenses of \$84,000.10, for a total of \$641,832.22, for
services rendered from October 15, 1996, to May 23, 1997.

IT IS FURTHER ORDERED that the Post Confirmation Committee is directed to
immediately pay to Otterbourg, Steindler, Houston & Rosen, P.C., the amounts set forth above to
the extent not already paid.

Dated at Milwaukee, Wisconsin, December 18, 1997.

BY THE COURT:

Honorable Margaret Dee McGarity
United States Bankruptcy Judge

94:12/18/97